NO. 21009

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPORTSWEAR, LIMITED, merly REGENCY CREATIONS, ITED, a corporation, Appellant vs. SWANK SHOP (GUAM) INC., orporation, Appellee	APPELLANT'S OPENING BRIEF

Appeal from Judgment Civil Case No. 58-65

District Court of Guam

Territory of Guam

EARANCES:

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

PAGE

STATUTES AND RULES

TEXTS

NO. 21009

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TSS SPORTSWEAR, LIMITED, formerly REGENCY CREATIONS, LIMITED, a corporation,	)
Appellant	)
vs.	)
THE SWANK SHOP (GUAM) INC., a corporation,	)
Appellee	)

On appeal from the District Court of Guam for the Territory of Guam.

OPENING BRIEF FOR APPELLANT

JURISDICTION

Jurisdiction of the District Court of Guam is based on 48 U.S.C., Section 1424. Jurisdiction of this appeal in this court is based on 28 U.S.C., Sections 1291 and 1294. The complaint (R pages 1 and 2) and amended complaint (R pages 28 to 31) are the pleadings which show the existence of jurisdiction of the District Court of Guam over this action. The notice of appeal (R page 87) is the pleading which shows the existence of the jurisdiction of this court to review the judgment appealed from.

STATEMENT OF THE CASE

A. The pleadings.

Appellant, TSS Sportswear, Limited, formerly Regency Creations, Limited, on November 8, 1965 filed Amended Complaint

n Book Accounts and Bills of Exchange against appellee, The wank Shop (Guam) Inc. (R pages 28 to 31). Count V was abandoned nd withdrawn. Counts I, II and III were upon bills of exchange n the sums of $2,880.56, $5,439.27 and $1,985.37, respectively ccepted by said appellee but which appellee failed to pay upon resentation. Count IV was balance due by book account. Count I demanded the sum of $5,179.25 due from appellant to Regency anufacturing Company, Ltd. by book account and assigned to ppellant by the said Regency Manufacturing Company, Ltd.

Appellee filed its answer (denying the allegations con- ained in plaintiff's amended complaint) and cross-claim December , 1965 (R pages 35 to 38) and its "Amendment to Cross-Claim" ecember 6, 1965 (R page 40). The cross-claim as amended alleged among other things) that David Weire was the sole owner of appellant nd Regency Manufacturing Company, Ltd and The Swank Shop, Limited, ong Kong; that by virtue of contract entered into on or about eptember, 1963 (Exhibit 7) the said David Weire sold all of his ight, title and interest in appellee to Margaret Karlins and Elliott arlins; that the said David Weire sold The Swank Shop (Guam), Inc. ree and clear of all indebtedness (except current indebtedness which as promptly paid); that at the time of the said sale David Weire alsely and fraudulently concealed from the said Margaret Karlins nd Elliott Karlins the fact that he intended to make demands upon ppellee for large sums of money as a result of alleged inter-company ransfers of merchandise and funds between his "alter egos, TSS portswear Limited, Regency Creations, Limited, Regency Manufactur- ng Company, Limited and The Swank Shop (Guam) Inc.;" that the said avid Weire caused the books and records of TSS Sportswear, Limited, egency Creations, Limited and Regency Manufacturing Co., Ltd. to be

changed and altered to reflect indebtedness of appellee which did not exist at the time of the sale.

Appellant on December 7, 1965 filed Reply to Cross-Claim (R pages 42 and 43) alleging failure to state claim upon which relief can be granted, and denying the allegations contained in said cross-claim. In addition appellant alleged that appellee (through its manager Margaret Karlins) had full knowledge of the demands set forth in appellant's complaint; that all of the books and records of appellee were in Guam in possession of said Margarette Karlins for at least four months before said sale (Exhibit 7) continuously to the time of filing of appellant's reply and that said books and records affirmatively show the greater part of the indebtedness sued upon.

B. The facts.

The Court, after finding that appellant had made out a prima facie case, required appellee to go forward with its defense, viz. that a fraud had been perpetrated by David Weire upon Margarette Karlins and Elliott Karlins in the sale by him to them of the capital stock of appellee (Exhibit 7); and that by the terms of said sale the indebtedness sued for had been extinguished (T 137, lines 5 to 17; T 197 lines 12 to 26; T 198).

Margarette Karlins testified on behalf of appellee that she and her husband purchased The Swank Shop store for $22,000.00 in accordance with the terms of an unsigned and undated memorandum (Exhibit A). She testified that David Weire wrote the "top half" and that she wrote the "bottom half" of Exhibit A (T 200, lines 13, 14 and 15); that the "bottom half" was all that portion of Exhibit A beginning with "58-59" (T 203, line 26; T 204, lines 1 to 5; T 205, lines 11 to 18) that the rest of Exhibit A was in the

handwriting of David Weire (T 204, lines 14 to 19; T 205, lines 4 to 10). The Court took over the examination of Mrs. Karlins and by asking leading questions and referring to other Exhibits in evidence caused her to change her testimony as to the amount of inventory at the time of the sale (T 207, lines 13 to 26; T 208; T 209, lines 1 to 20). The conduct of the court is urged as error.

Heath Edwards, handwriting expert for appellant testified that the upper half of Exhibit A was not in the same handwriting as Exhibit 21 (written by David Weire) (T 282, lines 11 to 26; T 283, lines 1 to 3); that a portion of Exhibit A was in the handwriting of Dave Williams (T 285, lines 3 to 13; T 286, lines 3 to 14) and that to the best of his recollection he, Heath Edwards, first saw Exhibit A between April, 1961 and July, 1962 when he was employed by the Bank of Hawaii (T 283, lines 4 to 26; T 284, lines 1 to 22). Nothwithstanding this very vital evidence which, if believed by the Court, would nullify Mrs. Karlins testimony, the Court refused to allow appellant's attorney to question Mrs. Karlins, as an adverse witness, concerning the handwriting on Exhibit A. (T 309, lines 9 to 26; T 310 lines 1 to 16). This was certainly error on the Court's part. The Court also refused to allow appellant to question Mrs. Karlins as an adverse witness concerning Exhibit A. (T 306, lines 19 to 26; T 307, lines 1 to 24; T 308, lines 4 to 26; T 309, lines 1 to 8). This was error, especially in view of the fact that Mrs. Karlins had changed her testimony as to the amount of inventory from $9,000.00 to $14,000.00 (see discussion above).

The Court refused to receive in evidence the depositions of Sanford Yung, H. K. Choi and Rosalind Lau (T 320, lines 2 to

26; T 321; T 322; T 323; T 324) although a showing was made that these witnesses would testify to a Regency Manufacturing Company account of which David Weire had no control at the time of the sale (T 320, lines 2 to 7). It was the duty of the Court to receive these depositions and determine from the evidence contained therein the validity of Count VI of appellant's amended complaint. Appellant made a showing that David Weire was not permitted to testify concerning the demands of appellant, including Count VI which was for an account due Regency Manufacturing Company at the time of the sale, subsequently assigned to appellant (T 136, lines 23 to 26; T 137, lines 1 to 26; T 138, lines 1 to 21).

Findings of Fact and Conclusions of Law were filed March 4, 1966 (R pages 83 and 84) and Judgment (R page 85) was entered on March 4, 1966 that plaintiff take nothing by its complaint and that defendant have judgment for its costs and disbursements in the sum of $817.43. On March 28, 1966 appellant filed Notice of Appeal from said judgment. (R page 87)

ERRORS RELIED UPON

The following are the errors upon which appellant relies:

I. The trial court erred in refusing to receive in evidence the depositions of Sanford Yung, H. K. Choi and Rosalind Lau.

II. The trial court erred in refusing to receive in evidence testimony of David Weire as to the indebtedness sued upon in appellant's amended complaint.

III. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to

answer the following question (T 310, pages 1 to 4) viz.:

"Q. (By Mr. Shapiro) You heard Heath Edwards state that the first line "'What does business own'" was signed by David Williams. Do you deny that he signed that?"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 310, lines 4 to 16):

"Mr. Crain: I object to that. She has already testified to that."

"The Court: That is the very question she testified to before and she said Mr. Weire. You have again repeated--"

"Mr. Shapiro: If your Honor please, I have not asked that question and I would ask the Reporter read back the question to determine whether or not I did ask it."

"The Court: The record will show that the witness was asked and insisted that the top portion of Exhibit A was written by Mr. Weire."

"Mr. Shapiro: The plaintiff contends that he has a right to cross examine."

"The Court: The Court has ruled. Go to your next question."

IV. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 309, lines 9 and 10) viz.:

"Q. (By Mr. Shapiro) You heard Mr. Edwards' testimony as to who wrote this memorandum. Do you still state that Mr. Weire--"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 309, lines 11 to 17):

"The Court: Mr. Shapiro, the witness, the first question you asked her was whether she still stated that and she said yes."

"Mr. Shapiro: If your Honor please, I did not ask her this question."

"The Court: You did ask her as your first question, you took Exhibit A and asked her to state whether she

still said that was what Mr. Weire had put down."

V. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 304, lines 1, 2, 5, 6, 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, I will ask you to look at Defendant's Exhibit A."

"Q. (By Mr. Shapiro) Now you state that that contains the agreement between you and Mr. Weire concerning the sale of the stock in Swank Shop (Guam), Inc., is that right?

The court answered the question instead of Mrs. Karlins (T 305, lines 8 to 15), viz.:

"The Court: The witness, Mr. Shapiro testified that Mr. Weire came to the Swank Shop, spent the morning, that he put down certain figures, called her in and said "' Maggie what will you give for this?'" And they talked it over and that these figures were put down his at the top and hers at the bottom."

"Mr. Shapiro: Yes, sir."

"The Court: And that after coming to an agreement as to $22,000.00 they went to see Mr. Gayle. Now that was her testimony."

VI. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 306, line 19) viz.:

"Q. (By Mr. Shapiro) Now how did you arrive at that $22,000.00?"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 306, lines 20 to 26; T 307, lines 1 to 24).

"A. I beg your pardon?

"Q. Will you please tell me how you arrived at that $22,000.00 figure?"

"Mr. Crain: If your Honor please, the Court just told him how she arrived at that."

"Mr. Shapiro: If your Honor please, the Court is not testifying. I am asking--"

"The Court: The witness has previously testified--"

"Mr. Shapiro: I am asking the witness to testify as to how she arrived at the $22,000."

"Mr. Crain: This is improper examination."

"The Court: I don't think it is improper examination except that it was gone over previously and you cross examined previously on it."

"Mr. Crain: That's right."

"Mr. Shapiro: I don't recall her itemizing the amounts and I will ask that Mrs. Karlins state what the $22,000 consisted of. If your Honor please, this is a vital matter here. Here we have a $4200 figure here. Mrs. Karlins states she chose to pay $22,000. Now I would like to know what the $22,000 consisted of."

"Mr. Crain: This was all part of the cross examination conducted yesterday."

"The Court: This she already told you what it was."

"Mr. Shapiro: I am asking her what tne $22,000 consisted of. I am entitled to know it, if your Honor please. This is a vital part here. Actually, the contract shows $22,000 and shouldn't be inquired into it at all but there has been an inquiry into it."

"The Court: You just stated Mrs. Karlins previous testimony was (a), the automobile, (b), the inventory, (c), the furniture."

"Mr. Shapiro: If your Honor please, I object to your Honor testifying as to what it is."

VII. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 308, lines 4 to 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, will you please itemize the amounts making up the $22,000 which you paid to, which you and your husband paid to Mr. Weire for the purchase price of the stock in Guam Swank Shop, Inc.?"

Following are the objections and comments relating to the refusal of the Court to permit answer of the foregoing question (T 308, lines 8 to 26; T 309, lines 1 to 7).

"Mr. Crain: That is the same question, your Honor, just rephrased."

"The Court: That is the same question that was answered and the witness was cross examined upon it before when she testified previously."

"Q. (By Mr. Shapiro) What was your previous testimony as to what the $22,000 consisted of?"

"Mr. Crain: The record speaks for itself."

"The Court: That question is improper. Whatever her previous testimony is is in the record. The Court will not permit you to go over it a second time, what you cross examined her on before."

"Mr. Shapiro: The plaintiff wishes to make a showing that Mrs. Karlins cannot make up the figures of the $22,000 and we wish, I wish to take an exception to the Court's ruling."

"The Court: Very well, exception noted."

"Mr. Shapiro: And exception to the Court's ruling for not allowing me to cross examine on this very vital point."

"The Court: The Court's ruling is that you have previously cross examined on this very vital point and the Court will not permit you to take up time going over the same matter again."

"Mr. Shapiro: The Plaintiff's attorney represents that he did not ask her what the $22,000 was made up of."

"The Court: The Court has ruled, Mr. Shapiro."

"Mr. Shapiro: May I make the record so I will have a good record, if your Honor please?"

"The Court: The record will show whatever the record shows."

VIII. The trial court erred in taking over the examination of Margarette Karlins and by asking leading questions and referring to exhibits in evidence causing her to change her testimony as to the amount of inventory at the time of the sale (T 207, lines 13 to 26; T 208; T 209 lines 1 to 20, as follows).

"The Court: And what about the $5000 it showed there as being owed, who was going to pay that?"

"A. That was included in the $9000 that was the inventory of the store. The inventory was $9000 but $5000 of it was still owed."

"Q. (By Mr. Crain) You mean you agreed to pay the--"

"A. Uh huh."

"Q. --pay for that merchandise that wasn't paid for?"

"A. Uh huh."

"Q. And you did pay for it subsequently, didn't you?"

"A. Yes, I did."

"The Court: What you are saying, I believe, is that the $5000 was deducted from the inventory. The inventory was roughly $14,000, wasn't it?"

"A. No, it was $9000."

"Mr. Crain: It was added back in then as a figure that was owed."

"The Court: Huh?"

"Mr. Crain: It was added back in as a part of the $22,000 consideration."

"The Court: What I am getting at is who is to pay the $5000?"

"Mr. Crain: She was."

"A. I did."

"The Court: So that the actual consideration, then, for everything free and clear, as you understood it, would be $27,000."

"A. No, $22,000."

"Q. (By Mr. Crain) It was to be $22,000 for what you were buying but were you assuming that obligation of those remaining bills? Isn't that correct, isn't that what your understanding was?"

"A. Yes. There were no outstanding bills. This was to wipe out the outstanding bills, clean."

"Q. Including the $5000 that he said was owed? I'm confused too, I'm sorry."

"A. You are confusing me."

"Mr. Crain: I think the Court had the right question."

"The Court: Did you say you would pay the $5000?"

"A. Yes, I would pay the $5000 that was owing."

"The Court: And did you pay it?"

"A. We paid it on the D/A's after, yes, we did."

"The Court: You remember, Mrs. Karlins, what was your inventory worth? Now, according to this balance sheet as it was originally prepared as of January 31st, your inventory as of January 31st was $12,332, 1962, and was $14,060.16 as of January 31st, 1963. During the period it increased $2000. Now had it gone down from $14,000 to $9000 before the time you bought this store?"

"A. Could I present the inventory sheet as of September 1, Judge?"

"The Court: What was your inventory as of the time you bought the store, was it $14,000 or $9000?"

"A. $14,000."

"The Court: $14,000?"

"A. Uh huh."

"The Court: Then when you say $9000, you meant that the net inventory after you paid for it. You would pay out $5000 and for purposes of sale it was worth $14,000 less the $5000 which you had yet to pay, or $9000."

"A. That's right."

"The Court: All right, that is what I said a few minutes ago and you said no."

"Mr. Crain: I confused her, your Honor. I'm sorry."

IX. The trial court erred in refusing to receive in evidence ıibit 24 for identification and in further refusing to permit ɔellant's attorney to make a showing for the record as to the ıtents of said Exhibit 24 for identification (T 314, lines 24 26; T 315; T 316, lines 1 to 11).

"Q. (By Mr. Shapiro) I show you Plaintiff's Exhibit 24 for identification. Will you state what that is?"

"A. This is a letter on the Bank of Hawaii, Guam branch, Agana, Guam, stationery, dated September 5, 1962.

"Q. Don't read it, it speaks for itself."

"The Court: September 5th, 1962?"

"A. Yes, sir."

"The Court: What has that got to do with this?"

"Mr. Shapiro: It has to do with the fact Mrs. Karlins was negotiating for the sale of the business of the stock at that time and it ties in with Mr. Edwards' testimony that dealings were had with the Bank of Hawaii by Mrs. Karlins and it corroborates that testimony."

"The Court: The Court will hold that it is too remote to have any bearing or any relevancy on a sale consummated in August, 1963."

"Mr. Shapiro: If your Honor please, the testimony of Mr. Edwards--"

"The Court: The Court has just ruled. Now go to your next question."

"Mr. Shapiro: Yes, sir. I just merely wanted to make the record straight. The plaintiff wishes to make a showing that Plaintiff's Exhibit No. 24--"

"The Court: The Court has just ruled. Now ask the witness another question or the witness will be asked to step down."

"Mr. Shapiro: If your Honor please, I would like to make a showing for the record."

"The Court: You have preserved your record."

"Mr. Shapiro: May I make a showing, please?"

"The Court: You may not make a showing."

"Mr. Shapiro: I may not make a showing of what the letter shows?"

"The Court: You are talking about a transaction in September of 1962 which has no bearing upon what happened in August of 1963."

"Mr. Shapiro: Well, if your Honor please, it is your opinion that it has no bearing but I feel that it has otherwise and I think if I am permitted to make a showing as to what I will prove by the letter--"

"The Court: Mr. Shapiro, ask the witness another question or ask him to step down, one or the other."

X. The trial court erred in receiving evidence of Margarette Karlins (T 199, line 6 to T 212, line 12) which contradicted the written agreement between David Weire and Margarette Karlins and Elliott Karlins (Exhibit 7).

XI. The trial court was biased and prejudiced against appellant. The following excerpts from the record show such bias and prejudice.

T 2, lines 22 to 24: "The Court: We have tried one case and I think it is fairly clear in that case that Mr. Weire is the alter ego of these various corporations."

T 3, lines 8 to 14: "The Court: Then your assumption is that Mr. Weire was the alter ego of these corporations."

"Mr. Crain: Both in Guam and in Hong Kong."

"The Court: Certainly in Guam, and that as the alter ego of the Hong Kong corporations, the selling of the stock and the receipt of the consideration wipped out, was an agreement to wipe out the existing indebtedness."

T 7, lines 21 to 26: "The Court: The court at this moment, of course, is familiar with the machinations which went on in connection with these various corporations so we have very little sympathy with your problem because it was perfectly clear at the previous trial that the suing corporation there was composed of Weire and a couple of other people, that Weire then formed a different corporation with a similar name--"

T 8, lines 12 to 15: "The Court: Then you have the intervention of the third corporation, TSS corporation, and, frankly, the entire thing has an odor about it which will have to be cleared up because throughout here we find, predominent, Weire, always in the thing."

T 9, lines 4 to 9: "The Court: I am not certain, but Weire's salient hand appears in everything. I want to get this thing down to a point as to whether The Swank Shop owes Weire because Weire is the key to this entire thing, and what, specifically, what, at the time the Swank Shop was purchased, was it purchased with knowledge of the outstanding indebtedness."

T 9, lines 14 to 19: "The Court: On the other hand, if all the books were kept by Weire and not shown-- It already appears rather clear that Mr. Arriola acted with conflicting interest in representing both the purchaser and the seller and, as the Court pointed out at the original trial, the cutthroat type of agreement the parties entered into was unconscionable..."

T 14, lines 11 to 26; T 15, lines 1 to 11: "Mr. Shapiro: May I ask that-- Mr. Weire can't get here upon the 7th. He did tell me he can get here upon the 14th. Would you put this off until the 14th and I will try to get him here?"

"The Court: I will not put it off until the 14th. Mr. Weire is an American businessman that sought the assistance of this court. Now let him come in and testify."

"Mr. Shapiro: That is why he filed the deposition, at least. Now I am asking the Court to continue it for a week so that I can get him here."

"The Court: The Court is denying it because this is now, as of today, gives Mr. Weire ample time to come from Hong Kong to Guam."

"Mr. Shapiro: He has other urgent business."

"The Court: This court is not set up for the purpose of accommodating Mr. Weire or any other litigant."

"Mr. Shapiro: Well, depositions are filed. If the plane can't get here, depositions are customarily used."

"The Court: Mr. Shapiro, the Court, as you just stated, the Court would rule upon your motion. The Court has ruled and has again ruled that the case is set for trial on February 7 and we expect to proceed at that time with Mr. Weire present in Court."

"Mr. Shapiro: I will file a formal motion for continuance."

"The Court: There is no need to file a formal motion for continuance because unless you are prepared to proceed, as the Court has indicated, upon February 7, the plaintiff, the complaint will be dismissed and the Court will proceed to evidence upon the defendant's cross complaint."

(Attention is also called to excerpts from transcript of evidence under specification of errors Nos. III to X, inclusive).

XII. Appellant was denied a fair trial.

Reference is made to excerpts from transcript of evidence under specification of errors Nos. III to XI, inclusive).

ARGUMENT

A. Summary.

In this action the appellant was denied its day in court, aving been deprived of a fair trial. (1) Depositions of appel- ant's material witnesses were arbitrarily excluded entirely rom evidence. (2) Appellant's president was not permitted to estify concerning the demands contained in its amended complaint. 3) The trial court refused to permit appellant's attorney to ully examine the president of appellee as an adverse witness. 4) The trial court took over the examination of appellee's pres- ident and by asking leading questions and referring to exhibits n evidence caused her to change her previously positive testimony. 5) The trial court pre-judged the case and (as set out in para- raph 4 above) caused appellee's president to testify so as to and credibility to appellee's very tenuous defense. (6) The rial court refused to permit appellant to call its witnesses in he order prescribed by appellant's attorney. (7) The trial judge as prejudiced and biased, assuming the role of an advocate for ppellee.

Appellant submits that the record clearly shows that in ruth and fact the trial court entered its judgment in favor of ppellee on the basis of a matter not in issue.

The issue announced by the court was alleged fraud

erpetrated upon the president of defendant and her husband and not
ie alleged harshness of the contract (Exhibit 7) which was never
scinded despite the fact that the said president within several
nths after the execution of said contract was fully apprised of
ie demands contained in appellant's complaint. If the real issue
s fraud, why did the trial court permit appellee to cross examine
nd itself actively to examine) Mr. Weire at length upon the
mands set out in appellant's amended complaint which for the time
ing at least was not in issue (T 142, lines 7 to 26; T 143 to
6; T 154 to 172). Why did the trial court in its opinion (T 325
T 333) speak mostly of the alleged unfairness of the contract
xhibit 7), if the real issue was fraud? The effect then of the
ial court's reasoning is that because the contract (Exhibit 7)
harsh, judgment should be entered in favor of appellee on the
sue of fraud. The said contract (Exhibit 7) entered into between
vid Weire and Margarette Karlins for the sale of the capital
ock of appellee is a valid, legal contract, relied upon by
pellee - appellee did not set aside the contract after full knowl-
ge of appellant's demands. Parties have a right to contract on
atever terms they deem advisable. As stated by the court, Mr.
ire had a right to make the best bargain obtainable for the sale
his stock. The alleged harshness of that bargain is immaterial.
valid contract cannot be set aside if it is later decided by one
the parties that a hard bargain was made.

It is noted that the Court refers to a previous case,
z.: Regency Manufacturing Company vs. Appellee. (Since the record
that case was not submitted, the court cannot base its decision
ereon). Appellant represents that said record will show that the
mand of Regency Manufacturing Company was admitted by appellee

in that action - recovery was allowed, subject to a set-off for commissions. The stand taken by appellee that all debts were cancelled is inconsistent with said judgment.

The testimony then of Margarette Karlins, to the effect that the demands contained in appellant's amended complaint were released, should have been excluded, since said testimony contradicted the terms of the written agreement between David Weire and Margarette Karlins and Elliott Karlins (Exhibit 7). The defense of fraud would not make this testimony admissible because it clearly appears from the testimony of Margarette Karlins that she knew or should have known of appellant's demands at the time of executing the said agreement (Exhibit 7) - knowing that these debts existed, it was incumbent upon her to provide in said agreement that said demands were released and satisfied, if that was the intention of the parties. Evidently, there was no agreement to release and satisfy said demands, as said agreement did not release same.

B. Argument Proper.

I. The trial court erred in refusing to receive in evidence the depositions of Sanford Yung, H. K. Choi and Rosalind Lau.

(Reference is made to the last two lines page 4 of this brief and the top half of page 5 thereof).

Following are excerpts from the record dealing with the exclusion of said depositions:

> T 320, lines 2 to 26; T 321 to T 324: "Mr. Shapiro: That is an account of Regency Manufacturing Company which Mr. Weire had no control over at that time. He could not have released that account and the evidence of the depositions will so show it. At this time I wish to offer in evidence the depositions of Chung Liang Lee, Sanford Yung, H. K. Choi, as witnesses on behalf of the plaintiff."

"The Court: I will receive any evidence and any depositions showing that Mr. Weire had not paid this indebtedness as of June, or as of August 28, 1963."

"Mr. Shapiro: All right, sir, I am offering all of these in evidence at this time and I, specifically the deposition of Chung Liang Lee concerns this indebtedness that I was talking about, Sanford Yung, H. K. Choy and Rosalind Lau."

"The Court: All right, point to the places in the depositions which deal with these, this particular matter."

"Mr. Shapiro: The entire deposition of Chung Liang Lee."

"The Court: You want the Court to take into evidence the entire deposition and then find out what is germane, is that it?"

"Mr. Shapiro: I am representing, if your Honor please, that this deposition has only to do with Regency Manufacturing Company indebtedness which was assigned to Regency Creations."

"The Court: Assigned to Regency Creations."

"Mr. Shapiro: Yes, sir, and I wish to also ask Mr. Weire--"

"The Court: Now, Mr. Shapiro, let's not have any mistake about this. This was an amount which Mr. Weire paid to Regency Manufacturing."

"Mr. Shapiro: Which he bought the account from Regency Manufacturing."

"The Court: When did he buy the account from Regency Manufacturing?"

"Mr. Shapiro: He didn't buy it, Regency Creations purchased it. It was subsequent to October of 1963."

"The Court: It was assigned subsequent."

"Mr. Shapiro: It was purchased subsequent and assigned subsequently also."

"The Court: Now you are stating; you are familiar with all of these actions; you are stating that Mr. Weire did not purchase this claim from Regency Manufacturing."

"Mr. Shapiro: He did purchase it after October of '63 after the deal for the sale of the stock had been consummated. The depositions will show that, if your Honor please, and I will refer you to them."

"The Court: What I want to see is where there is any reference to that."

"Mr. Shapiro: All right, sir, the depositions speak for themselves and those, Chung Liang--"

"The Court: I have the depositions before me. Point out at that point in the deposition that you want introduc-

ed the references to the particular question."

"Mr. Shapiro: I wish the entire deposition of Chung Liang Lee to be introduced in evidence because it concerns Count VI entirely, has nothing to do with any of the other counts in the complaint. Likewise, the entire deposition of Sanford Yung, H. K. Choi and Rosiland Lau. They merely concern the indebtedness due from Swank Shop (Guam) to Regency Manufacturing, which was assigned to Regency Creations after October of 1963. Now I can't separate it, it is all there, if your Honor please."

"Mr. Crain: It was my understanding that the Court had already dismissed Count VI and Count IV was the only count left in the complaint."

"The Court: What the Court is holding is that anything that, on August, between these parties on August 28, that Weire or Regency Creations had which could be a claim against the Swank Shop, Inc. in Guam were wipped out by that sale, all."

"Mr. Shapiro: This is not held by Regency Manufacturing. I mean this isn't held by Regency Creations.

"The Court: That is what I am trying to say to you, Mr. Shapiro, that the Court will receive evidence as to any claims that, that they were due to somebody else, but claims which arose subsequent to August 28."

"Mr. Shapiro: And that is what I am trying to explain to the Court, that those four depositions cover such claims, and also the testimony of Mr. Weire to identify the assignments of those claims."

"The Court: Now I want to know when Weire paid off Regency Manufacturing, where does that show in the deposition?"

"Mr. Shapiro: It shows in the deposition. The bookkeeper shows it and also Mrs. Lau."

"The Court: All right, just show me where it appears, Mr. Shapiro."

"Mr. Shapiro: All right, sir."

"The Court: You took the deposition."

"Mr. Shapiro: I think the whole deposition is pertinent, myself."

"The Court: I am not asking you what you think is pertinent yourself. I am asking you where it appears in the deposition that, as to the date when Mr. Weire paid off Regency Manufacturing."

"Mr. Shapiro: All right, sir, I will find it. It would appear in Mrs. Choi's. I'll find it."

"The Court: I take it we are talking about now the amounts received by Mrs. Karlins in trust from the, either Andersen or the Navy Exchange."

"Mr. Shapiro: No, we are waiving that."

"The Court: And not Regency Manufacturing."

"Mr. Crain: He says he is waiving that, they are not claiming that."

"Mr. Shapiro: To Regency Manufacturing. Just a minute."

"The Court: Are these bills that were of purchases subsequent to October?"

"Mr. Shapiro: Yes, sir, this was paid subsequent to October 13, 1963. I think I can find it in the depositions."

"The Court: What I want to know is did it exist on August 28, 1963?"

"Mr. Shapiro: Yes, it did. The obligation, yes, it did."

"Mr. Crain: It went back to 1961."

"The Court: Then if it--"

"Mr. Shapiro: Mrs. Lee attached an itemized list to her deposition."

"The Court: Then if it existed on August 28, then it is included in the agreement."

"Mr. Crain: In the sale."

"Mr. Shapiro: Mr. Weire had no control over that account until October of '63 when he purchased it."

"Mr. Crain: It is rather coincidental that he purchased it when he was kicked out."

"The Court: Well, that will be stricken. Mr. Crain is also fond of testifying."

"Mr. Crain: I'm sorry."

"The Court: Are you prepared to point to anything, Mr. Shapiro?"

"Mr. Shapiro: Here it is. It shows on here all right. It is in here and Mr. Weire can testify to it also."

"The Court: Well, you took the depositions."

"Mr. Crain: The books will speak for themselves."

"Mr. Shapiro: If your Honor please, I am distraught now and, frankly, it is hard for me to keep my mind on the work, but it is in here."

"The Court: Very well, the Court will hear final argument."

"Mr. Shapiro: Your Honor has dismissed the complaint, why does he have to have final argument?"

T 333, lines 13 to 26; T 334; T 335, lines 1 to 17:

"Mr. Shapiro: If your Honor please, the plaintiff

wishes to, the record to show that Count V of the complaint is for the sum of $5,179.25, which was due from the defendant to Regency Manufacturing Company, Ltd.; that as to that account Mr. Weire had no control over that. He never did own control of Regency Manufacturing Company. He was not the managing director of Regency Manufacturing Company and he had no authority to release any debts of Regency Manufacturing Company, Ltd. The plaintiff wishes the record--"

"The Court: The Court has assumed that the indebtedness upon which that was based existed on August 28, 1963; that when Mr. Weire paid off the indebtedness and assigned it to Regency Creations, that was their business. Regency Manufacturing said You owe this and he said I'll pay it, and subsequently assigned it to Regency Creations. But since it was in existence on August 28, 1963, it is part of the Regency-Weire settlement with the Karlins."

"Mr. Shapiro: May I complete my showing, if your Honor please?"

"The Court: Yes, very well."

"Mr. Shapiro: I don't think your Honor has read the depositions or heard Mr. Weire's testimony as to the ownership of stock, and so forth. Now we expect the evidence of Mr. David Weire would have shown that he had no control of Regency Manufacturing Company and that this indebtedness was assigned to him subsequent to October of 1963; that subsequent to October 1st, 1963, I believe October 19, 1963, he paid that and received an assignment of the indebtedness from Regency Manufacturing Company; that this is an independent account, has nothing to do with Regency Creations. That is what the evidence will show."

"The defendant--the plaintiff also wishes the record to show that his Honor, the Court, refused to accept the depositions or to read the depositions of Sanford Yung, H. K. Choi, Rosiland Lau. The latter, Rolisland Lau, is the managing director of Regency Manufacturing Company and her testimony would have clarified the whole matter, including the assignments covered by Count VI."

"Plaintiff wishes to further show that Mr. Weire, himself, would have testified as to this account and as to payments and for the assignment, and that the Court refused to allow him to testify, and also Chung Liang Lee, Sanford Yung, H. K. Choi, Rosiland Lau."

"The Court: The record will show that the Court asked counsel to point out anywhere in the depositions or any testimony that the indebtedness referred to was not in existence as of August 28, 1963, and received no such information."

"Mr. Shapiro: And the plaintiff's attorney stated that Mr. Weire would have testified from the books of

Regency Creations when that amount was paid and when the assignment was. The plaintiff also requested that he be allowed to identify the assignment of the accounts. The Court refused to allow him to do that."

"The Court: The Court held that that was entirely immaterial until you had laid the groundwork that the indebtedness accrued subsequent to August 28."

"Mr. Shapiro: The plaintiff feels he has been denied his day in court."

Appellant urges that, as to Count VI of appellant's mended complaint the evidence would have shown that David Weire id not have control of Regency Manufacturing Company, that he was minority stockholder, that he was not managing director, that at he time of the execution of the agreement (Exhibit 7) the sum ued upon was owed to Regency Manufacturing Company, that the aid David Weire had no authority to compromise that claim and hat he was not the alter ego of Regency Manufacturing Company. he depositions should have therefore been received under Count I of appellant's amended complaint.

20 Am. Jur. 240, Section 246: "...On the other hand, all facts and circumstances which are relevant to the issues - that is, all facts and circumstances which afford reasonable inferences or throw light upon the matter or matters contested - are admissible in evidence, unless the exclusion of any such fact or circumstance is required by some established principle of evidence, such as the hearsay evidence rule, the best evidence rule, or the rule that parol evidence may not be given to vary or contradict written instruments..."

20 Am. Jur. 240, 241, Section 247: "...Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other of the parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue is relevant and admissible..."

20 Am. Jur. 245, 246, Section 252: "The fact that evidence tending to prove an issue or constituting

a link in the chain of proof does not, standing alone, justify a verdict does not render it inadmissible under the rules of relevancy. Relevancy does not depend upon the conclusiveness of the testimony offered, but upon its legitimate tendency to establish a controverted fact; relevancy is that quality of evidence which renders it properly applicable in determining the truth or falsity of the matter in issue. Evidence which tends to prove a fact, regardless of how slight such tendency is, should be admitted upon the trial. Such evidence is competent, relevant, and admissible, although it may not be such as will independently establish a fact at issue..."

II. The trial court erred in refusing to receive in evidence testimony of David Weire as to the indebtedness sued upon in appellant's amended complaint.

Reference is made to argument, authorities and excerpts from record in Specification of Error No. I, which is concerned with Count VI of appellant's amended complaint.

Mr. Weire would have testified fully as to said Count VI and also as to all demands contained in appellant's amended complaint. The rejection of his testimony was error.

III. The trial court erred in refusing to permit Margarette Karlins (who was called as an adverse witness for appellant) to answer the following question (T 310, pages 1 to 4) viz.:

"Q. (By Mr. Shapiro) You heard Heath Edwards state that the first line "'What does business own'" was signed by David Williams. Do you deny that he signed that?"

Reference is made to the objections, comments and discussion contained under Specification of Error No. III (supra).

Appellant called Margarette Karlins (president of defendant) pursuant to Rule 43(b) Federal Rules of Civil Procedure, viz.:

"Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a

public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

Under the above rule appellant had the right to interrogate Margarette Karlins on any relevent matter in issue. The handwriting on Exhibit A was in issue. Heath Edwards, handwriting expert for appellant had testified that the portion of Exhibit A viz.: "What does the business own?" was in the handwriting of David Williams (T 285, lines 3 to 13). This was a very vital question going to the very foundation of appellee's defense and it was error for the court to refuse to allow Mrs. Karlins to answer.

Lawless v. Calaway, 24 C (2d) 81, 147 P 2d 604 held that the exclusion of expert testimony of an adverse witness was error under Section 2055 California Code of Civil Procedure (a statute similar to Rule 43(b) Federal Rules of Civil Procedure). The court stated:

"/11/ Statutes such as section 2055 were enacted to enable a party to call his adversary and elicit his testimony without making him his own witness. (Smellie v. Southern Pacific Co., 212 Cal. 540, 556 /299 P. 529/; Waller v. Sloan, 225 Mich. 600 /196 N.W. 347, 348/; Langford v. Issenhuth, 28 S.D. 451 /134 N.W. 889,892/.) They are remedial in character and should be liberally construed in order to accomplish their purpose. (Smellie v. Southern Pacific Co., supra.) Any relevant matter in issue in a case is within the scope of the examination of witnesses called pursuant to the provisions of such statutes. (Langford v. Issenhuth, supra; Waller v. Sloan, supra; Pfefferkorn v. Seefield, 66 Minn. 223 /68 N.W. 1072, 1073/; cf. Cioli v Kenourgios, 59 Cal. App. 690, 697 /211 P. 838/; Good v. Brown, 51 Cal.App. 199, 201 /196 P. 299/.) The opinion in Langford v. Issenhuth, supra, states: "'It is said that the widest and freest scope is to be given the examination. . . . The whole case may be fully and minutely investigated. . It appears to us the main purpose of the statute is to permit an adverse party to be called as a witness to

prove or to be interrogated concerning facts material to the case of the party calling him, and that such a witness may be called to prove a single material fact, or a number of material facts, even the whole case. The facts as to which the party calling such witness may desire to examine him are wholly within his discretion.'"

Also see Daggett v. Atchison T & S.F.R. Co., 48 C 2d 55, 313 P 2d 557, 64 ALR 2d 1283; MacGregor v. Kawaoka, 132 2d 407, 282 P 2d 130.

IV. The trial court erred in refusing to permit Margarette rlins (who was called as an adverse witness for appellant) to swer the following question (T 309, lines 9 and 10), viz.:

"Q. (By Mr. Shapiro) You heard Mr. Edwards' testimony as to who wrote this memorandum. Do you still state that Mr. Weire--"

The objections, comments, discussions and excerpts from e record contained under Specification of Error IV above are ie a part hereof.

Reference is made to the objections, comments, arguments i authorities contained under Argument, Specification of Error . III next above.

In view of the testimony of appellant's handwriting expert, ath Edwards, that the upper half of Exhibit A was not in the handriting of David Weire (T 282, lines 11 to 26; T 283, lines 1 to it was error for the court to refuse to allow Margarette Karlins answer the question.

V. The trial court erred in refusing to permit Margarette rlins (who was called as an adverse witness for appellant) to swer the following question (T 304, lines 1, 2, 5, 6, 7), viz.:

"Q. (By Mr. Shapiro) Mrs. Karlins, I will ask you to look at Defendant's Exhibit A."

"Q. (By Mr. Shapiro) Now you state that that contains the agreement between you and Mr. Weire

concerning the sale of the stock in Swank Shop (Guam), Inc., is that right?"

Comments and objections set out under Specification of ror No. V are made a part hereof. Also made a part hereof are e objections, comments, arguments and authorities contained ier Argument, Specification of Error No. III.

It is urged that the witness Margarette Karlins should ve answered the question and <u>it was not up to the court to lunteer the answers.</u>

VI. The trial court erred in refusing to permit Margarette rlins (who was called as an adverse witness for appellant) to swer the following question (T 306, line 19) viz.:

"Q. (By Mr. Shapiro) Now how did you arrive at that $22,000.00?"

The objections, comments and excerpts from the record con- ined under Specification of Error No. VI are made a part hereof. so made a part hereof are the objections, comments, arguments and thorities contained under Argument, Specification of Error No. I.

The court refused to allow Margarette Karlins to answer is question on the ground that appellant's attorney had previously oss-examined on said question. A reading of the transcript of pellant's cross-examination of Margarette Karlins reveals <u>that is question was never propounded to the said Margarette Karlins appellant's attorney</u> (T 212, line 21 to T 248, line 1).

In view of the fact that Margarette Karlins changed her stimony concerning the amount of inventory upon prompting from e trial court, (see Specification of Error No. VIII above) it was rticularly vital that she be examined on this matter. Appellant ges that Margarette Karlins would not have been able to itemize

he amounts making up the $22,000.00. At any rate this was a pro-
er question on a relevent issue and should have been answered.
he refusal to allow Margarette Karlins to answer is urged as error.

VII. The trial court erred in refusing to permit Margarette
arlins (who was called as an adverse witness for appellant) to
nswer the following question (T 308, lines 4 to 7), viz.:

> "Q. (By Mr. Shapiro) Mrs. Karlins, will you please itemize the amounts making up the $22,000 which you paid to, which you and your husband paid to Mr. Weire for the purchase price of the stock in Guam Swank Shop, Inc.?"

Comments and objections set out under Specification of
rror No. VII are made a part hereof. Also made a part hereof are
he objections, comments, arguments and authorities contained under
rgument Specification of Error No. III.

This is a companion question to that set out in Argu-
ent, Specification of Error No. VI next above and everything stated
herein is incorporated herein.

VIII. The trial court erred in taking over the examination
f Margarette Karlins and by asking leading questions and referring
o exhibits in evidence causing her to change her testimony as to
he amount of inventory at the time of the sale (T 207 lines 13 to
6; T 208; T 209 lines 1 to 20, as follows).

Excerpts from the record set out under Specification of
rror No. VIII above are made a part hereof.

A trial judge has no more right to propound improper ques-
ions to a witness than a party calling said witnesses. He is not
uthorized to propound leading questions (or refer to exhibits in
vidence) which would tend to change the testimony of a witness.
trial judge must be impartial and is not permitted to become an

advocate for one side. 12 Cal. Jur. 2d 117, Section 61:

> "... He should be temperate and courteous in his attitude toward counsel, should not show undue impatience or severity towards either, should exercise a high degree of patience and forebearance with counsel and witnesses, should maintain judicial poise throughout the trial and should have an open and unprejudiced mind. He must not show partiality towards any one side, and he should not judge the issues before all the evidence is presented..."

53 Am. Jur. 74, Section 74: "...Upon the trial judge rests the responsibility of striving for an atmosphere of impartiality. His conduct in trying a case must be fair to both sides... Since the judge's duties are of a judicial nature, he should not act as counsel for a party by raising objections which the party should make..."

53 Am. Jur. 76, Section 75: "...But he should not usurp the functions of counsel by prescribing the order of calling witnesses or interfering with the general conduct of the case by the attorneys, or by examining witnesses to the exclusion of counsel. Nor should the judge by a dissertation addressed to a witness endeavor to get him to change his testimony."

In People v. Giacomino, 347 Ill. 523, 180 N.E. 437, 84 A.L.R. 1168, the court stated:

> "...Nevertheless, the principal enunciated in the former case is not to be ignored even when a jury has been waived. In either event it is the duty of the judge to arrive at his conclusions from a calm, unbiased consideration of the facts. He should neither be prosecutor nor defender. While he is a searcher for the truth, it is not his duty to discomfit and confuse witnesses by his questions or attitude. The extent to which a judge may indulge in the examination of witnesses largely rests in his discretion, but in the exercise of such discretion he must not forget the function of a judge and assume that of an advocate..."
>
> "In King v. Com. (1920) 187 Ky. 782, 220 S.W. 755, it was said that the trial judge "'has no more right than counsel to ask irrelevant or incompetent questions, nor should he, by the questions that he does ask, or in his manner of propounding them, indicate that he has any bias or prejudice one way or the other.'"

It was particularly important that Margarette Karlins testify truthfully as to the figures contained on Exhibit A. As

er testimony was first given and positively affirmed by her,

he amount paid by her and her husband was $17,500.00, itemized

s follows:

Auto	$ 1,500.00
Inventory	9,000.00
Cash	2,000.00
F.F.&E	5,000.00
Total	$ 17,500.00

uch testimony was inconsistent with the purchase price of

22,000.00 paid for the stock and had to fall flat unless changed.

t was necessary, therefore, that she testify that the inventory

as $14,000.00 instead of $9,000.00 which would have brought the

otal up to $22,500.00, still $500.00 off. The court by leading

uestions and reference to exhibits finally led her to change her

estimony to the amount of inventory as $14,000.00. These ques-

ions would certainly have been improper if propounded by counsel

or appellee - they were all the more improper when propounded by

he court whose duty it was to arrive at the truth and to act as

n impartial referee, safeguarding the rights of appellant as well

s appellee. It is further urged that testimony that the inventory

as $14,000.00 contradicts the statement that the inventory was

9,000.00 contained on Exhibit A and is contrary to the parol

vidence rule.

IX. The trial court erred in refusing to receive in evidence

xhibit 24 for identification and in further refusing to permit

ppellant's attorney to make a showing for the record as to the con-

ents of said Exhibit 24 for identification (T 314, lines 24 to

6; T 315; T 316, lines 1 to 11).

Excerpts from the record set out under Specification of

rror No. IX above are made a part hereof.

It is fundamental that the party whose evidence is rejected

be permitted to make a showing for the record so as to permit him to bring the matter properly before the appellate court. It might be held by the appellate court that the exhibit was properly rejected. On the other hand appellant had a right to have the appellate court pass on that question and his right to make a showing for the record was error.

Heath Edwards had testified that he saw Exhibit A while he was working at Bank of Hawaii. Exhibit 24 would have corroborated his testimony that negotiations were taking place there. The letter could have further been tied in with David Weire's testimony to show that the memorandum Exhibit A was written up far before the date of the sale. The evidence contained in said exhibit was relevent, competent, and material - said exhibit should have been received in evidence.

X. The trial court erred in receiving evidence of Margarette Karlins (T 199, line 6 to T 212, line 12), which contradicted the written agreement between David Weire and Margarette Karlins and Elliott Karlins (Exhibit 7).

> 20 Am. Jur. 958, 962, 963, Section 1099: "It is a general principle that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing; in other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent. This rule is especially applicable to contracts under seal. The legal effect and operation of the writing cannot be controlled by parol evidence. The theory that proof of prior and contemporaneous negotiations and representations, though not admissible to vary the terms or legal effect of the written contract, may be received for the purpose of raising an estoppel in pais

is a mere evasion of the salutary rule which protects written contracts from impeachment by loose collateral evidence and, upon principle and authority, is not tenable... The reason of the rule is that as the parties have constituted the writing to be the only outward visible expression of their meaning, no other words are to be added to it or substituted in its stead. The writing still remains the best evidence of the understanding of the parties, even though, through defect of form or by reason of some positive provision of law, it cannot have the effect intended for it... Except for the purpose of having a contract reformed, a party to a written agreement may not assert its validity and at the same time deny that the writing embodies the actual contractual rights and obligations which the parties intended to make..."

"Sec. 1100. Rule as One of Substantive Law. The rule which denies effect to an oral agreement which contradicts a written contract entered into at the same time or later is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties."

Appellant urges that the alleged oral agreement contradicting the terms of Exhibit 7 was improperly received, as contrary to the parol evidence rule. It clearly appears from the testimony of Margarette Karlins that she was in possession of the books of appellee (T 215, lines 2 to 26) several weeks before the agreement of sale of the stock (Exhibit 7) was executed. The books and records in possession of Mrs. Karlins for several weeks before the sale (Exhibit 7) showed as of January 31, 1963 under Bills Payable - Bank of America (Drawn by Regency Creations, Ltd.)

Invoice 643/2/219	2,880.56
Invoice 665/2/222	5,439.27

and under Other Accounts Payable

Regency Manufacturing Co. (Ltd.) Disbursements A/C	$1,475.88

See Exhibit 1.

Since January 31, 1963 Bill of Exchange for $1,985.37 was accepted on March 27, 1963 and the Regency Manufacturing Co. account was increased to $5,179.25. This latter bill of exchange and items

purchased from Regency Manufacturing Company since January 31, 1963 were evidently not entered on appellee's books. However the first three items, listed, viz.: $2,880.56, $5,439.27 and $1,475.88 were and are at present actually listed as debts of appellee. These books and records were in possession of Margarette Karlins several weeks prior to the said sale (Exhibit 7) and Margarette Karlins certainly knew (or should have known) of the existence of these debts at the time of said sale.

It also appears that Margarette Karlins explained the agreement of the parties to Mr. Gayle, her attorney (T 206, lines 25 and 26; T 207, line 1) who made notes of the transaction (Exhibit F). Said notes (Exhibit F) make no mention of any assumption of debts and shows purely and simply a stock sales transaction. The evidence of Margarette Karlins therefore as to Exhibit A is not competent evidence. <u>There was no fraud upon which she was justified in relying,</u> since she knew of the existence of the three items mentioned above. Knowing of these items it was incumbent upon her to have required the release of same - the only conclusion for her failure to do so is that there was no intent to release same.

XI. The trial court was biased and prejudiced against appellant.

The excerpts from the record under Specification of Error No. XI are made a part hereof.

Attention is also called to excerpts from the record under Specification of Errors Nos. III to X inclusive.

The authorities contained under Argument, Specification of Error No. VIII are made a part hereof.

From the very beginning it appears that the trial court pre-judged the case and decided that David Weire was the "alter

ego" of plaintiff (T 2, lines 22 to 24; T 3, lines 8 to 14; T 7, lines 21 to 26; T 8, lines 12 to 15; T 9, lines 4 to 9. It is noted that all these remarks were made before any trial in this case and such remarks indicate that the trial court had already decided against appellant. The court it appears made up its mind on that issue without receiving any evidence in this case. The basis for his finding was his opinion derived from trying a previous case of Regency Manufacturing Company vs. appellee which was decided in favor of Regency Manufacturing Co., subject to a set-off for commissions) - the record of that case was not submitted in evidence - therefore the trial court cannot consider the evidence contained therein.

> 20 Am. Jur. 105, Section 87: "In the trial of a case before it, a court ordinarily will not, upon either its own motion or suggestion of counsel, take judicial notice of the records, judgments, and orders in other and different cases or proceedings, even though such cases or proceedings may be between the same parties and in relation to the same subject matter. In other words, a court, in deciding one case, will not take judicial notice of what may appear from its own records in another and distinct case, unless made part of the case under consideration by the formal introduction of such records into evidence..."

Appellant admits that virtually all of the stock of appellant was and is owned by David Weire; as to Regency Manufacturing Company, however, the evidence is uncontradicted that David Weire is a minority stockholder and has and had no control over the said Regency Manufacturing Company - he therefore, could not be the "alter ego" of that corporation. Actually there is no competent evidence in this case that Margarette Karlins dealt with David Weire as if he were in fact the appellant or Regency Manufacturing Company. The trial courts finding (without competent evidence to sustain it) was simply taken for granted and no proof was offered

by Margarette Karlins on the issue of "alter ego."

Bias and prejudice is shown in the court's partiality to appellee in the granting of 4 extensions of time to answer from July 27, 1965 (when appellees answer was due) to December 1, 1965 R, page 6; R, page 15; R, page 18; R, page 34, a period of over 4 months and refusing to continue hearing on appellant's behalf for 7 days (T 14 lines 11 to 26; T 15 lines 1 to 11). The court stated (T 24 to 26):

> "The Court: This court is not set up for the purpose of accommodating Mr. Weire or any other litigant."

The court required taking of discovery depositions of David Weire precedent to the taking of appellant's depositions (T 4, lines 13 to 15; T 5, lines 21 to 26; T 6; T 7, lines 1 to 6. Said discovery depositions were taken in Hong Kong November 9 1965 R, page 16) by appellee. The deposition of David Weire was taken on November 16, 1965 (R, 33) for the purpose of using same at the trial of this action. Notwithstanding that appellee had taken David Weire's discovery deposition in Hong Kong and further notwithstanding that appellee's attorney cross-examined David Weire at the taking of his deposition in chief, the court on its own motion ordered that David Weire make himself available to testify in this court at the time of trial as a condition precedent to the presentation of appellants case - no tendering of charges was made (R, page 54). David Weire did attend, as appears from the record in this case; however, the action of the trial judge, under the circumstances, indicated his bias and prejudice. It is submitted that it was improper to require Mr. Weire's presence at the trial on the court's own motion without tendering charges - the courts refusal to grant a 7 day continuance upon representation

of appellants counsel to the trial judge that Mr. Weire's deposition would be used was likewise an indication of bias and prejudice. Mr. Weire had business commitments which he had to cancel and suffered an extreme hardship by the trial court's arbitrary refusal to allow Mr. Weire to come 7 days later. The undersigned represents that the case would not have been prejudiced by the granting of the reasonable request for a short extension. Contrast on the other hand the treatment of appellee as shown above who was given an extension of more than 3 months to answer. Does this indicate impartiality on the trial judge's part? In addition to the above it is urged that the trial judge indicated his bias and prejudice as set out in Specifications of Errors Nos. I to X, inclusive.

The authorities appearing under Argument Specification of Error No. X are made a part hereof.

XII. Appellant was denied a fair trial.

This is a companion specification to Specification of Error No. XI. The entire Specification No. XI and all arguments excerpts and matters set out thereunder are made a part hereof.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment appealed from should be reversed.

Dated November 30, 1966

Respectfully submitted,
David M. Shapiro
DAVID M. SHAPIRO
Attorney for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appelas for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

David M. Shapiro
DAVID M. SHAPIRO
Attorney for Appellant